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BY FAX AND ECF
Hon. Richard J. Holwell
United States District Court
Southern District of New York
500 Pearl Street
New York, NY 10007

Re: *United States v Solomonyan, et al*, 05 Cr. 327 (RJH):

Your Honor:

We submit this letter on behalf of the defendant Ioseb Kharabadze in response to the government's letter dated March 4, 2009, which was received yesterday evening. Surprisingly, the government has chosen to raise – less than 48 hours before sentencing is scheduled to occur – an entirely new guidelines argument, i.e., that the offenses may be grouped under U.S.S.G. § 3D1.2(d), thereby making it unnecessary for the court to determine which objects of the conspiracy were proven beyond a reasonable doubt. The government's argument should be rejected, both because it is untimely and, in any event, meritless.

The government has changed its position

By way of background, after the initial pre-sentence investigation report, we raised various objections to the probation office. Among other things, we strenuously argued that, pursuant to Application Note 4 of U.S.S.G. § 1B1.2(d) – which refers to the method of ascertaining a base offense level for conspiracies with multiple objects – the base offense level here was governed by U.S.S.G. § 2M5.2, rather than U.S.S.G. § 2K2.1. Essentially, we explained that, because the jury verdict did not specify which object of the conspiracy it had found, this Court was obligated to make a determination as to which object it would have found, sitting as the trier of fact. Because the facts supported, at most, the finding that Mr. Kharabadze had conspired to engage in illegal brokering, rather than the distinct object of firearms trafficking, we reasoned that § 2M5.2 applied.

After the probation office issued its final pre-sentence investigation report on or about November 7, 2008, the government then submitted a letter to this Court, dated November 17, 2008, "in response to issues raised in Kharabadze's submissions to the Probation Department." *See,* Gov't letter, 11/17/08, p1. In this letter, the government expressly agreed with our interpretation of Application Note 4 of U.S.S.G. § 1B1.2(d), i.e., writing, "In this case, the verdict did not establish whether the first object (brokering activities) or the second object (transport or possess a machine gun or destructive device [sic]) was the object of the conspiracy. Accordingly, the Court must decide whether, were it sitting as a trier of fact, it would convict the defendant of conspiring to the second object of Count One." *See,* Gov't letter, 11/17/08, p6, n.3.

Thereafter, we submitted to this Court a 26-page letter, dated December 8, 2008, meticulously discussing numerous guideline arguments. Among other things, we exhaustively discussed the record in order to argue that this Court, sitting as trier of fact, would not have convicted Mr. Kharabadze of 18 U.S.C. § 922(a)(4), and consequently, U.S.S.G. § 2M5.2 was the applicable guideline. Also in that letter, we specifically observed that the government had not claimed – and could not claim – that the grouping analysis set forth in U.S.S.G. § 3D1.2(d) authorized this Court to forego the requirement of Application Note 4 that it determine whether both objects of the conspiracy had been proven. *See,* Neuman letter 11/8/08, p.6, n3. The government did not respond to this letter.

Following an evidentiary hearing where the co-defendant Artur Solomonyan testified, we submitted a second letter to this Court, dated January 20, 2009, maintaining that Mr. Solomonyan's testimony had strengthened each of our prior arguments, including that § 2M5.2 applied. Subsequently, in a letter dated February 16, 2009, that the government finally responded to us. In that letter, however, the government still did not mention its current claim.

Finally, on the eve of sentencing, the government argues to this Court, for the first time, that the base offense level may be determined without making a finding about which object of the conspiracy this Court would have found, sitting as a trier of fact. Although the government suggests this approach is merely an alternative basis for applying the base offense level – and corresponding enhancements – set forth in § 2K2.1, the fact is (as explained *infra*) that this position is diametrically opposed to the position set forth in prior submissions to this Court.

In light of this history, we submit that this Court should reject the government's argument as untimely. Simply put, permitting the government to rely, at this late date, upon a new rationale for calculating Mr. Kharabadze's guideline level (and all the corresponding enhancements) would be grossly unfair.[1]

The government's interpretation of the grouping guideline is incorrect

In any event, the government's current position is meritless. As noted in our earlier submissions, subsection (d) of § 1B1.2 advises that "[a] conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit." But Application Note 4 cautions that "particular care must be taken in applying" subsection (d) because:

> "there are cases in which the verdict or plea does not establish which offense(s) was the object of the conspiracy. In such a case, subsection (d) should only be applied with respect to an object offense alleged in the conspiracy count if the court, were it sitting as a trier of fact, would convict the defendant of conspiring to commit that object offense. Note, however, if the object offenses specified in the conspiracy count would be grouped together under § 3D1.2(d) (*e.g.*, a conspiracy to steal three government checks), it is not necessary to engage in the foregoing analysis, because § 1B1.3(a)(2) governs consideration of the defendant's conduct." (emphasis added).

Thus, where, as here, the jury does not specify which objects it found, "the trial judge must independently determine whether each object was proved beyond a reasonable doubt." *United States v Parris,* 88 F.Supp.2d 555, 564 (E.D. Vir. 2000); *accord, United States v Vallejo*, 297 F.3d 1154, 1169-70 (11th Cir. 2002); *United States v Macklin,* 927 F.2d 1272, 1280 (2nd Cir. 1991). Importantly, "[s]uch a procedure provides *more* protection to a defendant than a motion pursuant to Rule 29," which grants the government the benefit of all inferences. *United States v Parris,* 88 F.Supp. at 564. "A trial judge who sits as a trier of fact draws independent conclusions from the evidence, including conclusions regarding credibility." *Id.* Simply put, the judge must put himself in the jury's position and consider whether the trial evidence established each element of the crime in question beyond a reasonable doubt. *See e.g., United States v Hernandez,* 141 F.3d 1042, 1052 (11th Cir. 1998).

Notably, Application Note 4 does not suggest – as the government now argues – that a court may simultaneously employ two different methods in order to ascertain the correct guideline;

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[1] If nothing else, the government's evolving position suggests a tacit recognition that its earlier arguments for applying the firearms guidelines are not tenable.

rather, the court is directed to do one of two things: (1) consider which object(s) it would convict the defendant of conspiring to commit, were it sitting as a trier of fact; or (2) in the event that the object offenses are grouped under § 3D1.2(d), apply the relevant conduct concepts of § 1B1.3(a)(2).

Moreover, here it is clear that the offense cannot be grouped under § 3D1.2(d). That provision states:

> "All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule: ****
>
> (d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior."

The guideline then refers to various specific guidelines which either must be grouped, or are specifically excluded from grouping. § 2K2.1 is specifically included as a guideline that should be grouped, but § 2M5.2 is not mentioned in either list.

Application Note 6 provides additional guidance. That note states that subsection (d) "provides that most property crimes *** drug offenses, firearms offenses, and other crimes where the guidelines are based primarily on quantity or contemplate continuing behavior are to be grouped together." As examples, the application note lists the situations where the defendant is convicted of: (1) five counts of embezzlement; (2) two counts of theft of social security checks and three counts of theft from the mail, each from different victims; (3) five counts of mail fraud and ten counts of wire fraud, all of which involve a monetary objective; (4) three counts of unlicensed dealing in firearms; (5) different counts of selling different drugs; (6) three tax evasion counts; (7) three counts of discharging toxic substances; and (8) two counts of forgery and one count of uttering the first of the forged checks. But the note indicates that grouping would not apply where a defendant is convicted of three counts of bank robbery.

Here, it makes sense that § 2K2.1 would be groupable under§ 3D1.2(d) since the guidelines for firearms trafficking are based largely upon the volume of firearms. But in stark contrast, the guideline for § 2778 is not based upon any kind of "aggregate harm."

In addition, even though both objects of the conspiracy involve weapons, the societal interests protected are easily distinguished. The firearms statute (18 U.S.C. § 922), obviously, is meant to protect the public from the use, possession and distribution of firearms. But the illegal brokering statute (22 U.S.C. § 2778) is meant to proscribe the import, export and transfer of foreign defense articles listed on the United States munitions list, without a license. While each may generally entail issues of safety and bear a superficial similarity, only the latter seeks to protect the United States security and foreign policy interests that underlie the licensing requirements set forth in the Code of Federal Regulations. *Compare, United States v Chavin,* 316 F.3d 666 (7th Cir. 2002) (rejecting automatic grouping where the crimes did not involve substantially the same harm); *United States v Lancaster,* 968 F.2d 1250 (D.C. Cir. 1992); *see also, United States v Salgado-Ocamp*, 159 F.3d 322, 328 (7th Cir. 1998) (grouping should not occur where the statutes protect different societal interests); *United States v Griswold,* 57 F.3d 291, 296 (3rd Cir. 1995) (rejecting grouping of firearms counts); *United States v Bush,* 55 F.3d 536, 539 (3rd Cir. 1995) (firearms convictions do not necessarily involve the same societal interests so as to warrant grouping); *United States v Cousens,* 942 F.2d 800, 808 (1st Cir. 1991) (rejecting grouping, noting that a defendant "who purchased different firearms on different occasions for different purposes using funds from different sources, readily may be distinguished from a defendant who pleads guilty to three counts of unlicensed dealing in firearms").

The only attempt the government makes to argue that the two objects are groupable is the citation, in a footnote, of the language in § 3D1.2(d) that "the offensive behavior is ongoing or continuous in nature." Govt' letter 3/4/09, p2, n.2. But plainly, distinct offenses can't be grouped together simply because each may be continuous. Under this logic, firearms crimes, narcotics crimes, and child pornography all could be grouped together, though each involves vastly different societal interests.

In this regard, *United States v Rudolph,* 137 F.3d 173, 179-80 (3rd Cir. 1998) is illustrative. There, the defendant argued that his bribery offense and the offense of sale of government property should have been grouped together because the conduct was ongoing or continuous. The Third Circuit agreed, however, that "grouping is not authorized under this subsection based on continuing conduct unless the offense guideline expressly takes into account the continuing nature of the conduct." 137 F.3d at 180. As examples, the court noted that § 2G2.2(b)(4), unlike the guidelines for bribery and sale of government property, provided for an enhancement where the defendant engages in a "pattern of activity." *Id.* Similarly, here § 2M5.2 contains no enhancement or language addressing continuing conduct, making it ill-suited for grouping under that theory. *See also, United States v Griswold,* 57 F.3d at 297.

For all these reasons, and considering that the government has cited no caselaw[2] to support the proposition that§ 2K2.1 and § 2M5.2 should be grouped pursuant to § 3D1.2(d), this Court should – as suggested by the prior submissions of both parties – make a determination as to which objects of the conspiracy it would find proven beyond a reasonable doubt, were it sitting as a trier of fact. Under this approach, § 2M5.2 should be deemed the applicable guideline for both Count 1 and Count 2.

Respectfully submitted,

James E. Neuman

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[2] Most of the government's letter relies on cases discussing § 1B1.3 and relevant conduct concepts. But none of those cases address the threshold question of whether the guidelines in question are groupable pursuant to § 3D1.2(d).